

United States District Court
District of Massachusetts

BRANDON ASSOCIATES, LLC,

Plaintiff

V.

FAILSAFE SAFETY SYSTEMS CORP.,

Defendant

C.A. No. 04-12013-NMG

**OPPOSITION TO DEFENDANT BLUE SAGE CONSULTING, INC.'S MOTION FOR
ATTORNEYS FEES AND COSTS**

The Motion of Blue Sage Consulting, Inc. ("Blue Sage") for attorneys fees and costs for briefly defending the above action prior to Plaintiff Brandon Associates, LLC's ("Brandon") Second Motion to Amend, which was granted on December 8, 2004, must be denied because it is substantively unwarranted and facially defective.

Blue Sage's theory of recovery appears to rest on the bald assumption that it was added as a defendant solely to defeat federal diversity jurisdiction. *See* Blue Sage's Memorandum in Support of its 12(b) Motion to Dismiss. The attached affidavit of Stacy Silveira, Esq. refutes that premise. Blue Sage's principal was and is an owner of Failsafe which has breached its contract with Brandon; Blue Sage's principal introduced Brandon Associates to Failsafe; Blue Sage's principal wrote the Investor Overview for Failsafe that included unauthorized and actionable references to Brandon and its principal. Avoiding diversity was not a reason for suing Blue Sage - it was an unintended consequence. Blue Sage was named as a defendant for legitimate reasons

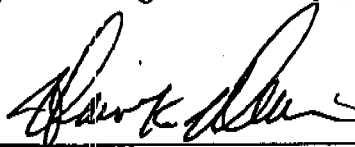
1 relating to viable causes of action. Thus, it was the conduct of Blue Sage that caused it
2 temporarily to be drawn into this litigation. Brandon's subsequent decision to streamline the case
3 to focus on the contract claim against Failsafe and remove the other defendants should be
4 applauded as an effort to simplify the dispute and serve the interest of judicial economy. Brandon
5 should not be punished for its laudatory effort at narrowing issues in this unduly complex
6 litigation.
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10 There is no basis for deviating from the American Rule that requires parties to bear their own
11 legal costs. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). Nor does
12 the movant point to any statutory authority or applicable case law to shift that burden.
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15 In addition, the affidavit submitted by the movant purportedly in support of its attorneys' fees
16 and costs is facially defective. There are no contemporaneous time records or billing detail
17 concerning the services allegedly rendered. Dates, the nature of the activity and the amount of
18 time expended on each task are not supplied as required. Counsel does not establish his relevant
19 experience, the reasonableness of his rates, or his customary billing practices. Nor does the
20 affidavit or other papers demonstrate sufficient billing judgment. Finally, the fee application does
21 not establish the movant's legal entitlement to fees. Blue Sage's counsel did not prevail
22 procedurally or substantively. He merely protected his client in the face of potential liability.
23 This is not recoverable absent bad faith or sanctionable conduct, neither of which exist here.
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28 For the foregoing reasons, Brandon Associates respectfully requests that this Court deny and
29 dismiss Blue Sage's Motion for Attorneys Fees and Costs.
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5 Respectfully submitted,
6 Brandon Associates, LLC
7 By and through his attorneys,
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10 Harris K. Weiner, Esq. (MA Bar # 551981)
11 Law Office of Jeffrey B. Pine, Esq. PC
12 The Heritage Building
13 321 South Main St., Ste 302
14 Providence, RI 02903
15 401/351-8200 – Telephone
16 401/351-9032 – Facsimile

17 **CERTIFICATION**

18
19 I, the undersigned, hereby certify that a true copy of the above document was sent postage pre-
20 paid to Robert Wilson, Jr., Esq. 46 Washington Street P.O. Box 633 Ayer, MA 01432-0633
21 01756, and Laurie M. Ruskin, Esq., Sweder & Ross, LLP, 21 Custom House Street, Suite 300,
22 Boston, MA 02110 on this 21 day of December, 2004.

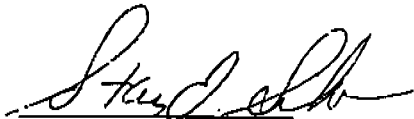
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AFFIDAVIT

I, Stacy Silveira, hereby declare to the best of my knowledge and belief that:

1. Blue Sage, Inc. was added to the first Amended Complaint because the Principal, Pam Camagna, was a shareholder of FailSafe Air Safety Systems Corp. (FailSafe), a functionally close corporation and was also intimately involved in the management of FailSafe.
2. Blue Sage, Inc. was added to the first Amended Complaint because the Principal, Pam Camagna, introduced Brandon Associates to FailSafe Air Safety Systems Corp. (FailSafe).
3. Blue Sage was added to the first Amended Complaint because Pamela Campagna was the author of the Investor Overview which contained fraudulent information about the Plaintiff.
4. The result of destroying diversity was an unintended byproduct but not the reason why Blue Sage was added as a party to the First Amended complaint.

Signed under the pains and penalties of perjury, this 10th day of December.



Stacy J. Silveira, Esq.
BBO # 650675